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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-963

FIRST NATIONAL BANK OF FAYETTEVILLE, FIRST STATE BANK, BANK OF ELKINS, FIRST NATIONAL BANK OF SPRINGDALE, McILROY BANK, BANK OF LINCOLN, FARMERS AND MERCHANTS BANK, AMERICAN SAVINGS AND LOAN ASSOCIATION, and FAYETTEVILLE SAVINGS AND LOAN ASSOCIATION,
Petitioners,

v.

JAMES E. SMITH, Comptroller of the Currency of the United States, and NORTHWEST NATIONAL BANK,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

Northwest National Bank in Opposition

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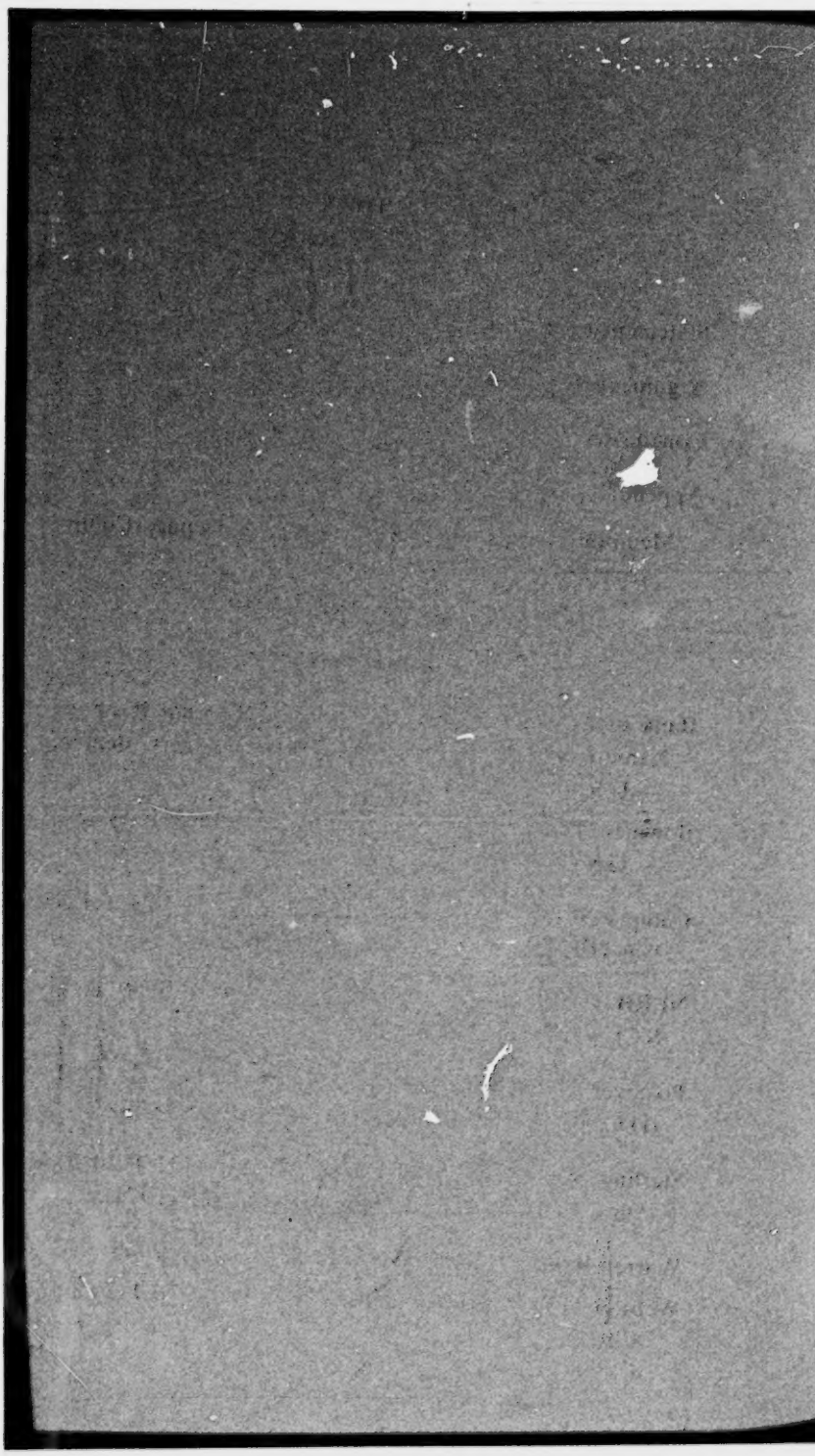

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STATEMENT OF THE CASE

Respondent cannot concur in the petitioner's Statement of the Case because many of the statements contained therein are argumentative in nature. Respondent submits the following Statement of the Case (references are to the administrative file):

In an application dated July 8, 1972, ten persons applied to the Comptroller of the Currency of the United States for permission to organize a national bank (the respondent herein) in the vicinity of Highway 71, Fayetteville, Washington County, Arkansas. In support of their application, the organizers submitted detailed financial, biographical and economic data (A.F. 547 *et seq.*) as requested by the Comptroller's office. A field investigation was conducted by a commissioned National Bank Examiner (A.F. 14-60). The Arkansas State Bank Commissioner and competing financial institutions were notified by letter that the application had been filed (A.F. 531, 537-38). Pursuant to the request of the petitioners, a public administrative hearing was held before the Comptroller's Regional Administrator in Memphis, Tennessee, on November 21, 1972 (Hearing Transcript).

The record as developed was subsequently reviewed by the Regional Administrator in Memphis and by members of the Comptroller's senior staff in Washington (A.F. 8-13, 61-63). The Regional Administrator recommended disapproval of the application, as also did the National Bank Examiner (A.F. 8; Pet. App. 76-B). The Comptroller's senior staff was divided in their recommendations. The Director of the Bank Organization Division, and a senior economist in the Department of Economics, Banking and Research, recommended against approval (A.F. 9; Pet. App. 76-A). Thomas G. DeShazo, Deputy Comptroller of the Currency, recommended approval (A.F. 10-12; Pet. App. 73-76). With the entire record before him, including the various conclusions and recommendations of his staff, the Comptroller granted preliminary approval of the application on February 5, 1973 (A.F. 13; Pet. App. 73), subject to sixteen specific conditions (A.F. 20-23).

Petitioners thereafter sought an administrative stay of the Comptroller's grant of approval, whereupon the Deputy Comptroller again reviewed the administrative record and, in a detailed

memorandum reviewing the facts, recommended that the request for a stay be denied (A.F. 83-89). The Comptroller concurred and denied an administrative stay (A.F. 83). The memorandum of the Deputy Comptroller is set forth in the appendix hereto.

Petitioners filed their complaint in the United States District Court for the Western District of Arkansas on or about February 16, 1973. The Comptroller answered the complaint and moved for summary judgment. Respondent Northwest National Bank intervened, answered the complaint and filed pleadings in support of the Comptroller's motion. Petitioners also requested summary judgment in their favor. On November 1, 1973, the District Court entered judgment granting the petitioners' motion for summary judgment and overruling the Comptroller's motion for summary judgment. The District Court held that there was no rational basis in the record for the Comptroller's decision, that there was no genuine issue as to any material fact, and that the action of the Comptroller was arbitrary, capricious an abuse of discretion or otherwise not in accordance with the law.

The Comptroller and Northwest National Bank appealed the District Court's decision to the United States Court of Appeals for the Eighth Circuit. On December 31, 1974, the Court of Appeals rendered its opinion reversing the decision of the District Court and holding that while articulating the correct standards of review, the District Court in fact exceeded those narrow limits and erroneously decided that the Comptroller had acted arbitrarily and capriciously.

ARGUMENT

There is no occasion for review by this Court. The Comptroller's decision was properly made in accordance with the broad discretion recognized by this Court in *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed. 2d 106 (1973), and by the Courts of Appeals, *e.g., Bank of Commerce of Laredo v. City National Bank of Laredo*, 484 F.2d 284 (5th Cir. 1973), *cert. denied*, — U.S. —, 40 L.Ed. 2d 109 (1974); *Webster Groves Trust Company v. Saxon*, 370 F.2d 381 (8th Cir. 1966); *Sterling National Bank of Davie v. Camp*, 431 F.2d 514 (5th Cir. 1970), *cert. denied*, 401 U.S. 925 (1971); *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968).

Point I

Petitioners concede that based upon the economic and other data and statistics contained in the administrative record, the Comptroller would not have abused his discretion regardless of the decision reached (Pet. 9). Petitioners also agree that the Court of Appeals correctly stated the law in that it is within the Comptroller's broad discretion to accept or reject the views of his subordinates as he sees fit (Pet. 16). Petitioners' sole complaint is that the Comptroller did not give "due regard to the facts gathered by an investigator who is in a position to draw accurate conclusions" (Pet. 16).

Petitioners present two examples to substantiate their allegations that the Comptroller failed to give due regard to the opinions of his subordinates (Pet. 12-15). Petitioners first allege that the Comptroller failed to give due regard to the conclusions of the subordinates that larger banks were needed to meet the banking needs of the community rather than a new bank (Pet. 12-13). It should be emphasized that the need for additional full-service banking facilities in the proposed area was recognized

by both the National Bank Examiner and the Regional Administrator (A.F. 44, 63). The question was whether this need could best be satisfied by the chartering of a new institution or by allowing the existing institutions to continue to grow. The decision to allow a newly chartered institution to compete with existing ones, rather than allow the existing institutions to grow without additional competition, was certainly one within the scope of the Comptroller's supervisory authority. By opting for a new bank and the resultant increased competition, the Comptroller cannot be said to have thereby failed to give due regard to the opinions of his subordinates. The Deputy Comptroller's second memorandum, concurred in by the Comptroller, reflects the following consideration:

> "The arguments advanced by the competing banks were not persuasive. The present and projected economic growth of the service area provides a more than adequate base for applicants' bank and all existing banks in the area and the need for a convenient source of full banking services in the heavily trafficked commercial area along U. S. Highway 71 presents an apparent present need for the proposed bank. Moreover, the additional banking competition offered by a new entry would, in our experience, result in the improvement of banking services by the existing banks to the ultimate benefit of the entire banking public." (A.F. 87; App. A-6).

Petitioners secondly allege that the Comptroller failed to give due regard to the conclusions of his subordinates that the organizers of the new bank, as a group, were unsatisfactory (Pet. 13-15). Petitioners primarily complain that the Deputy Comptroller indicated that the conclusions of the National Bank Examiner of the Regional Administrator were not supported by the record. However, the investigation report of the Examiner itself reflects that no adverse comments were received about the organizers from outside sources (A.F. 47).

The confidential material in the Examiner's investigation report (the "confidential file") reflects that the Examiner firmly recommended for approval the following proposed directors of the new bank: Mr. Donald Baker, a medical doctor and surgeon (C.F. 2; Pet. App. 87); Mrs. Virginia Morris, noting that it is expected that she might be chairman of the board (C.F. 10; Pet. App. 91); and Dr. John Owen, Dean of the College of Business Administration and professor of economics at the University of Arkansas (C.F. 12; Pet. App. 91-92). The Examiner recommended disapproval of Mr. Jackson Eoff, concluding that his "reason for affiliation with the proposed bank is questioned as well as his general reputation and character" (C.F. 6; Pet. App. 89). The Examiner stated that Mr. Eoff's character was questioned by "management of the local financial institutions" (C.F. 6; Pet. App. 89). These local financial institutions include the petitioners herein. As to Mr. Charles Pearson, Jr., an attorney, the Examiner recommended disapproval because of Mr. Pearson's "involvement in business promotion and general reputation" (C.F. 14; Pet. App. 92). As to Mr. Carl Rose, the Examiner cited his "lack of financial capacity in personal business affairs" and felt that he was "outspoken and generally uninformed on current economics" (C.F. 16; Pet. App. 93). Disapproval was recommended despite the fact that the Examiner stated that Mr. Rose's influence with the local rural community would be valuable (C.F. 16; Pet. App. 93), and despite the facts that Mr. Rose is employed as County Agricultural Agent and holds a masters degree in agriculture economics from the University of Arkansas (C.F. 523, 528). As to Mr. Loris Stanton, the Examiner questioned his prudence in business relations, his stability, and his capacity for "self dealing" (C.F. 20; Pet. App. 94). Mr. Stanton is past president of the Fayetteville Board of Realtors, past director of the Arkansas State Board of Realtors and at the time of the application was serving a three-year term on the Board of Directors of the City of Fayetteville (C.F. 687). As to Mr. Dwight Morris, the Examiner noted that Mr. Morris' connection with the Associated Milk Producers, Inc. was the

only possible matter that could affect his association with the proposed bank, and concluded that his leadership and organizing ability would be of great help to the bank (C.F. 8; Pet. App. 90). Finally, Mr. John Cook was not recommended for approval as proposed president despite his previous 11 years of banking experience (C.F. 106-07). The Examiner concluded that he did not possess "sufficient leadership capacity" and that he "lacks aggressiveness and appears to have weaknesses relative to public relations and marketing" (C.F. 4; Pet. App. 88)

It is evident that the recommendations of disapproval depended in large part on the personal opinion and judgment of the National Bank Examiner. Respondent does not wish to imply that the Examiner's conclusions should not bear on the decision to grant or deny a new banking charter, but viewing the proposed officers as a group, it surely cannot be said that the record does not provide rational support for the Comptroller's decision. The Court of Appeals, recognizing that both favorable and unfavorable comments appeared in the administrative file with respect to the organizers, stated:

> "The District Judge concluded that the Deputy Comptroller and the Comptroller had ignored the findings of the Examiner and the Regional Administrator. We do not draw the same inference. The investigative reports reflect a board composed of men of wide-ranging business and banking experience who possessed substantial personal financial strength for the area in which the proposed bank would serve. Innuendos about self-serving propensities, speculative business practices and suspicions of shady practices were presented to the Comptroller, and we cannot say that his rejection of these rumors in favor of the hard record of a reasonably experienced and balanced board of citizens with deep roots in the community was either arbitrary or capricious." (Pet. App. 67-68)

Point II

Petitioners urge this Court to adopt a rule of limited review with respect to a district court's review of an administrative decision. The Court of Appeals for the D.C. Circuit suggested in *Polcover v. Secretary of the Treasury*, 477 F.2d 1233 (D.C. Cir.), *cert. denied*, 414 U.S. 1001 (1973), that one way to avoid duplicative review would be to accord some deference to the District Court's review of the record and its determinations. The case of *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951), was cited, and the petitioners also rely on this decision. In *Polcover*, however, the Court of Appeals itself rejected such a procedure, stating:

> "We find, however, that for several reasons such a maneuver would not be appropriate. (1) The Supreme Court 'rule' has developed most strongly in NLRB cases, where the Court has been influenced by the fact that 'Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders.' NLRB v. Pittsburgh Steamship Co., supra, 340 U.S. at 502, 71 S.Ct. at 456. No similar Congressional charge exists here. (2) The Supreme Court itself has experienced difficulty in the execution of such a 'rule.' *See* Gastelum-Quinones v. Kennedy, 374 U.S. 469, 83 S.Ct. 1819, 10 L.Ed.2d 1013 (1963). (3) a 'rule' limiting our appellate review to a determination of whether the district court utilized the proper scope of review, or was clearly erroneous (by-passing questions of the difficulty of application) will most likely in application amount either to a rubber stamp—in which instance we will merely be shifting the needless delay from the district court to the court of appeals—or degenerate into the test we presently utilize. (4) Such review would be contrary to unwaivering precedent established in this circuit, and would treat review of Civil Service Commission action

> differently from that afforded other agencies. A better solution must be found." *Polcover, supra* at 1227 (footnotes omitted).

It was concluded that in the last analysis such a move must be made by the legislative rather than the judicial branch of government. *Polcover, supra* at 1228.

The Court of Appeals specifically found that the District Judge exceeded the narrow limits of review of an administrative decision by independently weighing the evidence and reaching his own conclusions (Pet. App. 69). The Court of Appeals thus held, in essence, that the District Court did not make a fair assessment in accordance with the proper legal standards, the test urged by the petitioners. If the Court of Appeals were required to remand the case to the District Court for additional review utilizing the proper standard, such a procedure would cause even more delay and inefficiency than is now experienced.

Point III

The Court of Appeals reversed the District Court on the basis that it had exceeded its narrow scope of review. This Court has recently reiterated that under the "arbitrary and capricious" standard the scope of review is a narrow one. *Bowman Transportation v. Arkansas-Best Freight System*, — U.S. —, 95 S.Ct. —, 42 L.Ed.2d 447 (1974).

Petitioners assert that the District Court's review of the record was not in an effort to show that the Comptroller's decision was wrong (Pet. 23). However, such an interpretation is not in accord with the thoroughly negative approach exhibited by the District Court's opinion. Despite the unanimous administrative approval of the proposed capital of the new bank, the District Court found the capital structure inadequate both as to amount and source (365 F.Supp. at 905; Pet. App. 40-42).

As to the earning prospects of the new bank, the District Court directly appraised the credibility and conflicting testimony of the two leading witnesses, concluding that the testimony of the petitioners' witness was "hinged more closely to the actual facts and conditions in the area" (365 F.Supp. at 906; Pet. App. 44). The District Court also directly determined that there may be a need for another bank in the area in the year 2000, but "certainly not at this time" (365 F.Supp. at 906; Pet. App. 44). With respect to the convenience and needs of the community to be served by the new bank, the District Court reviewed the administrative file only to the extent that it contained evidence to support the recommendations of disapproval of the National Bank Examiner and the Regional Administrator (365 F.Supp. at 907; Pet. App. 46-47). Of the nine items of evidence cited by the District Court to show substantiation of the conclusions of the subordinates, six were obtained directly from the testimony of petitioners' leading witness who was also a Director of one of the chief protesting banks (Hearing Transcript 55, 57, 64, 72, 77, 94). The extensive testimony of the witness for the organizers was ignored, as was the evidence indicating the need for a new bank contained in the very reports of the Examiner and Regional Administrator. The District Court continued its "negative" review of the record with respect to the Comptroller's approval of the proposed officers of the new bank, by examining only those facts and opinions unfavorable to the Comptroller's approval. It should again be noted that no adverse comments about the proposed officers were received from disinterested, outside sources (A.F. 47).

The entire approach of the District Court is in sharp contrast to the reasoned and balanced examination of the record conducted by the Court of Appeals.

Aside from the fact that the Comptroller chose to rely on other evidence in the administrative record rather than follow the recommendations of certain of his subordinates, the peti-

tioners do not really argue that the administrative record provides no rational basis for the Comptroller's decision. Their entire argument is based upon the proposition that the Comptroller failed to consider the opinions and conclusions of the National Bank Examiner and the Regional Administrator. The memoranda submitted by Deputy Comptroller DeShazo reflect a detailed consideration of all factors investigated by the Examiner and the Regional Administrator. Respondent submits that the crux of the petitioner's complaint is not that the recommendations of the two subordinates were not considered, but that the recommendations were not followed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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